

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KEVIN COOPER,

Petitioner,

v.

RICHARD A. RIMMER, Acting
Director of the California Department
of Corrections, and JEANNE
WOODFORD, Warden, San Quentin
State Prison, San Quentin, California,

Respondents.

Case No. 04-70578

DEATH PENALTY CASE

**EXECUTION IMMINENT:
Execution Date February 10, 2004**

**REPLY IN SUPPORT OF
APPLICATION TO FILE SUCCESSOR
PETITION FOR WRIT OF HABEAS CORPUS
AND REQUEST FOR STAY OF EXECUTION**

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I. INTRODUCTION

Federal courts consistently have been entrusted with habeas jurisdiction to have “the final say” as to whether state courts “have denied rights guaranteed by the United States Constitution.” *Brown v. Allen*, 344 U.S. 443, 500, 510 (1953) (opinion of Frankfurter, J., for the Court). At no time is this responsibility more important than when the state is seeking to execute a person who has raised a colorable claim of innocence. Indeed, “the quintessential miscarriage of justice is the execution of a person who is entirely innocent.” *Schlup v. Delo*, 513 U.S. 298, 324-25 (1995); *id.* at 325 (the “core” concern of the criminal justice system that there be no “conviction of an innocent person”).

Kevin Cooper seeks this Court’s permission to file a successor petition for writ of habeas corpus because facts that were previously unknown and unavailable at the time of the filing and resolution of his first petition in the district court compel consideration of the nine claims for relief before this Court. These facts, which form the predicate facts required by 28 U.S.C. Section 2244(b)(2)(B)(i), when considered in connection with all of the facts in this case – including those previously known – as required by U.S.C. Section 2244 (b)(2)(B)(ii), provide ample justification to issue a stay of execution and authorize the filing of the successor petition.

Although respondent opposes Mr. Cooper's application, she fails to mention – let alone address – these compelling new facts. As outlined in the petition and the Application, these facts include:

1. Evidence of perjury committed by the State's criminalist Daniel Gregonis at trial and during the DNA proceedings brought by Mr. Cooper following the enactment of California Penal Code Section 1405. Although there were serious questions raised about Gregonis's analysis of the physical evidence and subsequent testimony at trial, it was not until the DNA proceedings commenced that Mr. Cooper obtained evidence that Gregonis testified falsely and continued to manipulate and tamper with the evidence used by the State to secure a death sentence. The facts to support Mr. Cooper's claims could not have been developed with the exercise of due diligence at the time the first habeas petition was filed because it did not emerge until the commencement of the DNA proceedings and subsequent hearing.

The new evidence supporting Gregonis's misconduct consists of his actions and testimony in connection with the recent DNA analysis of critical evidence in the case. In August 1999, unbeknownst to Mr. Cooper, prior to the DNA testing, Gregonis took possession of critical evidence later linked to Mr. Cooper through DNA analysis. (Ex. 146 at 1971-72 [testimony at the June 2003 DNA Hearing].) Gregonis testified at the June 2003 DNA hearing that he "did not" open the metal

pillbox containing A-41, the sole drop of blood found in the Ryen home linked to Mr. Cooper. (Ex. 94 at 982.) In so doing, he assured the Superior Court that he was not physically able to tamper with A-41 in any way. Gregonis's testimony at the hearing, and his assurances that he did not have access to the actual sample of A-41, are flatly contradicted by the photographs of A-41 taken upon its arrival at the DNA lab in 2001. These photographs, attached as Exhibits 36 and 38 in support of the Application and discovered well after the conclusion of the first habeas proceedings, show that Gregonis unsealed the container housing A-41 and resealed it on August 13, 1999, the date that he returned the evidence. Gregonis's false testimony calls into question not only the DNA analysis of A-41, but also every aspect of his blood analysis prior to trial and his subsequent trial testimony.

2. Conclusive evidence of tampering with the cigarette butts found in the Ryen automobile. In 1983, cigarette butts allegedly recovered from the abandoned Ryen automobile were tested and found consistent with Mr. Cooper. In the recent DNA proceedings, these cigarette butts were subjected to DNA testing, the results of which proved that Mr. Cooper's saliva was found on these.

The new evidence supporting Mr. Cooper's claims that this evidence was tampered with is two-fold. First, Gregonis took possession of the cigarettes and Mr. Cooper's saliva in August 1999, at the same time that he checked out A-41. He subsequent false testimony concerning A-41 provides strong support that he

engaged in similar tampering with respect to the cigarettes. Second, the cigarette denominated as V-12 that was subject to DNA analysis was not the same cigarette allegedly found in the Ryen automobile. In connection with DNA proceedings – conducted well after the completion of the first federal habeas proceedings – Mr. Cooper learned that cigarette denominated as V-12 in 2001 had doubled in size from that at the time of the pretrial analysis. (Compare Ex. 95 [measurement of V-12 at prior to trial is 4 mm] with Ex 203 at 2483 [measurement of V-12 is 7x7 mm] and 204 [photograph of V-12 aligned with a ruler].) Following this discovery, Brian Wraxell, the State’s expert at trial stated that V-12 was consumed in testing prior to trial. (Ex. 211 at 2520.)

Unquestionably, Mr. Cooper could not have discovered and presented claims based on these facts in the first petition. Moreover, evidence that state officials have tampered with V-12 and have concealed – and continue to conceal that tampering – provides ample justification to stay Mr. Cooper’s execution and authorize the filing of the successor petition.

3. Conclusive evidence that the State’s testimony concerning the distinctive shoeprints was false and exculpatory information was concealed from Mr. Cooper at trial. On January 8, 2004, Mr. James Taylor signed a declaration of stating that – contrary to his trial testimony – he did not provide Mr. Cooper with the tennis shoes that made the distinctive impressions. (Ex. 100.) Subsequent to Mr.

Taylor's declaration, Midge Carroll, the former Warden at the institution where Mr. Cooper allegedly obtained the distinctive shoes, provided a declaration with evidence – for the first time – that the State knew that the prosecution's theory and evidence at trial were false. (Ex. 101.) None of these facts was known at the time the first federal petition was litigated. Respondent asserts, however, that Mr. Cooper did not exercise due diligence in discovering this facts, but she fails to explain why a habeas petitioner is obligated to interview Mr. Taylor and every other witness who testified at trial, and some (like Carroll) who did not.

The evidence before this Court demonstrates that the State unconstitutionally obtained Mr. Cooper's convictions and death sentence based on false evidence. Equally important, it provides ample evidence that the source of the blood shoeprint found in the Ryen home was left by one of the actual killers, who was not Mr. Cooper.

4. Evidence that Detective Eckley's destruction of the bloody coveralls was authorized by an official in the homicide division or a supervisor and that Detective Eckley's testimony to the contrary was false. Prior to and during trial, Detective Eckley testified that he alone made the decision to destroy the critical bloody coveralls provided to police by Diane Roper. (Ex. 185 at 2320-22; Ex. 125 at 1161; 200 at 2452 [did not ask if it were permissible to discard the overalls].) In December 1998 – well after the conclusion of the habeas proceedings in the district

court – Mr. Cooper finally gained access to the Sheriff’s Department microfiche and microfilm file and viewed the Disposition Report. It revealed that Detective Eckley’s testimony that he made the decision to destroy the critical evidence without consulting anyone was false. (Ex. 186 [destruction decision reviewed by “KS”, 195 at 2424-25.] Such evidence provides additional support for Mr. Cooper’s claims.

Rather than address these and the other facts supporting the petition, respondent is content to repeat the observations made in previous decisions reviewing Mr. Cooper’s trial. Those decisions, however, suffer from the inadequate record developed prior to the discovery of the new facts presented in this application and accompanying petition. For example, prior to the development of the microfiche records, courts reasonably could conclude that Detective Eckley testified truthfully when he stated that he was solely responsible for destruction of the bloody coveralls. Such a conclusion cannot be made without a full examination of the evidence before this Court.

Most critically, simple additional tests will demonstrate Mr. Cooper’s claims of evidence tampering and actual innocence. Mitochondrial DNA testing of blond hairs found in one of the victim’s hands will demonstrate that the hairs did not come from Mr. Cooper and, moreover, may provide the identity of the real killer.

The testing for the presence of the preservative agent EDTA on a T-shirt will prove how the blood got there.¹

Like half of the jurors who have submitted their doubts about the evidence, Mr. Cooper respectfully requests the authorization to demonstrate his innocence. Staying his execution to ensure that the State of California is not executing an innocent man on February 10, 2003, is compelled by the Constitution and Federal statutes.

II. RESPONDENT'S POSITION ON CLAIM ONE IGNORES EVIDENCE PRESENTED AT TRIAL AND THE NEWLY-DISCOVERED EVIDENCE

Cooper's Claim One centers on the evidence that he is innocent. From Josh Ryen's initial statement, "that's not him," to Koon's detailed confession, and through the bloody coveralls, the affirmative evidence of innocence is truly compelling. *Carriger v. Stewart*, 132 F.3d 463 (9th Cir. 1997). (recognizing actual innocence as a claim for relief) Add to these pieces of evidence, the thoroughly discredited investigation and evidence manipulation in this case, and Cooper's free-standing claim becomes clear. Cooper has never been provided with a hearing, much less discovery, on his allegations of innocence.

¹ Such testing will be conducted on the T-shirt even if the execution goes forward. Mr. Cooper sought to file a Motion to Preserve the T-shirt currently in the custody of the Superior Court. Mr. Cooper's next-of-kin intends to seek custody of the T-Shirt before the State orders its destruction and perform the required testing.

Instead of addressing the bona fides of Cooper's claim, respondent focuses on the fact that some of the evidence was raised before, during Cooper's trial. (Response, at 16-17.) The fact that evidence of innocence was presented at trial is irrelevant to this Court's inquiry. That is why this is a free-standing claim, to be evaluated on its merits. Yes, some evidence of innocence was presented before that's why his jury was out seven days and many of them no longer support death upon hearing the new evidence. But, Cooper has now added more – statements of witnesses that forever cast doubt on the state's proofs (the tennis shoes); evidence that the criminalist lied just recently; evidence that the cigarette butt has grown and morphed. These items, and those contained in the Application and Petition, all establish a sufficient claim under the statute.

Recognizing that the majority of the evidence of innocence was not presented at trial, respondent merely states that these "allegations fail to establish his innocence." There is no discussion of the bona fides of these allegations or their relationship to the remaining evidence, the true nature of the inquiry here. It is as if respondent believes that the evidence Cooper has presented is ignored, it will go away. It will not and it must be considered and addressed by this Court.

Respondent then retreats to a familiar refrain in this case: the California Supreme Court opinion. (Response, at 17-19.) Throughout the Cooper litigation, respondent cites to that court's discussion of the facts rather than the actual facts

themselves. The reason for this is simple – the state court opinion conveniently ignores each dispute over each fact upon which it relies. In just one example, the California Supreme Court opinion completely ignores evidence that Joshua Ryen stated “that’s not him” upon first viewing Cooper’s pictures on the television. (Ex. 189 at 2360-61.) What’s worse, the state court opinion also ignores the attempt by investigating detective to deny that such exonerating statements were made, and the fact that three witness came forward with it. (Ex. 57 at 632-35; Ex. 67; Ex. 58 at 648.) The witnesses know what O’Campo did to Joshua Ryen and how he cemented doubt when none originally existed. The state supreme court, however, simply cannot bring itself to a dispassionate discussion of the facts of this case.²

Another example of respondent’s citation to authority rather than the record is to avoid having to deal with “inconvenient” facts is respondent’s use of the state court opinion to posit that a bloody hatchet sheath was found in the Lease house. Response, at 18. We know how that got there, though, and respondent will ever be candid enough to admit it:-- it was planted by officers who searched that room originally and claimed they did not see it, or even go into that room. They had no

² Another example is taken from the quoted section of respondent’s Opposition. There, respondent asserts a motive for the attack – taking the Ryen vehicle. Response, at 18. Respondent knows full well that no such motive existed, and was contradicted by the record. The fact that respondent sees fit to cite this section of the state court opinion in every brief they file, without correcting the false

explanation for how their fingerprints were all over the area in which it was thought Cooper was sleeping, including the floor of the bedroom where the sheath was found. (Ex. 172 at 2214; Ex. 25 at 180-83.)

This list goes on. The point is that respondent cannot cite to the facts in the record, because they do not support her position. Instead, she will use the subterfuge of citation to a very flawed state court opinion, on that no court should rely upon to sentence a man to death.

Finally, respondent gets to the newly-obtained DNA results. Respondent never mentions that it was Cooper's two-year struggle to get these tests done, and respondent's intransigence all along that prevented it. To this day, respondent continues to prevent the remaining testing of the hairs in the victim's hands, a very similar test was recently used to exonerate a capitally-charged defendant.

Associate Press, February 6, 2004: *Feds Seek to Withdraw Charges v. Man* (case against Darrell Rice dismissed by federal prosecutors). There is no excuse for not testing those hairs – they are neither Cooper's nor the victims', they are the perpetrators and respondent knows it.

The DNA testing that was allowed was on evidence that all along everyone knew would be of questionable character because of the problems with the

impression it gives, displays a knowledge of exactly how weak a case it was against Cooper.

evidence in this case. Respondent admitted as much when she opposed DNA testing by claiming that the evidence storage had been such that it was not worth testing. Petitioner has painstakingly laid out the problems with each piece of this evidence, from the blood spot, to the cigarettes, to the T-shirt. In one answered allegation, Cooper has proven that there was evidence tampering and/or switching. V-12 is simply not what was found in the Ryen vehicle, it would defy the laws of physics to say otherwise.

Likewise, A-41 has been so manipulated over the years, that no court can have any confidence that what we are seeing is what was present at the time of the crime. Most recently, the main criminalist, Gregonis, was caught lying about what he did with this evidence. Respondent has no response to this, merely to say that there is DNA on items of evidence does not answer the question of where that evidence came from.

Respondent also ignores the fact that that the T-shirt may very well contain evidence of tampering that Cooper will never know if he is executed. She just wishes to ignore this argument, with the hopes that it will go away. It will not.

In perhaps the most daring hubris, respondent asserts that Cooper has not presented any evidence someone else committed the crime. (Response, at 20.) First, Cooper does not have to identify and pin the crime on someone else in order to establish his innocence. Second, it appears as if respondent has not read the

papers, Furrow and Koon are all over them. Cooper has presented a confession by Koon. What more does respondent want?

The evidence discussed in this claim and this point in the Application is both a free-standing innocence claim, and one that supports relief on the others. By simply ignoring what Cooper has to say, respondent hopes the Court will as well. The truth of the matter is that this is a case where inept evidence gathering, preservation and testing, and corrupt investigation, have led to unreliable evidence of guilt, and there remains overwhelming, credible evidence of innocence.

III. CLAIM TWO: RESPONDENT IGNORES THE CLEARLY NEW-OBTAINED EVIDENCE DEMONSTRATING HIS CONTENTION ALL ALONG THAT THE EVIDENCE AGAINST HIM WAS THE PRODUCT OF TAMPERING, CONTAMINATION AND MANIPULATION

Respondent grossly mischaracterizes the evidence submitted in support of Cooper's claim that government misconduct tainted his trial and directly and materially contributed to his wrongful conviction. The state claims Cooper is merely "repeating and embellishing" claims previously raised on this issue. (Response, p. 22.) In so doing, the state has completely ignored a series of indisputable facts that, under no circumstances whatsoever, could have been discovered by Cooper prior to the filing of Cooper's first federal habeas petition. Realizing this to be the case, the state merely asserts – without providing an iota of evidence to either support the state's claims or refute the substantiated factual

support provided by Cooper – that the facts raised in Cooper’s successor petition in support of Claim Two could have been discovered through due diligence prior to 1997. Clearly, the State has not conducted even a cursory review of the exhibits cited by Cooper in support of Claim Two.

First, Criminalist Gregonis’ false testimony provided at the evidence tampering hearing conducted in June 2003 obviously could not have been raised six years earlier in 1997. At the 2003 hearing, Gregonis testified that he had not opened, in August 1999, a glassine envelope containing blood drop A-41 that was later submitted for DNA testing. (Ex. 192 at 2394-96.) However, a photograph of the envelope clearly shows both Gregonis’ initials on tape used to re-seal the glassine envelope, and the date “8/13/99” marked directly adjacent to Gregonis’ initials; the presence of Gregonis’ initials on the altered seal is a marker that the glassine envelope had been opened and re-sealed in August 1999. (Exs. 36, 38; Ex. 93.) Therefore, Gregonis had opened the glassine envelope and examined the contents of A-41 in August 1999, without disclosing this fact to the defense in 1999.³

³ Respondent notes the scientific advances in DNA that allow for renewed examination of minute portions of evidence. Response, at 21 n.1. That may or may not be true in any particular case, but if it is, it also demonstrates that even the most careful examination of evidence must account for contamination of results with trace amounts. That is why Gregonis’ 1999 adventure is so significant, and

In light of previous questions surrounding Gregonis' handling of A-41 at the time of trial, Gregonis' motivation for providing false testimony at the June 2003 is clear: Gregonis tampered with A-41 in 1999, prior to submitting it for DNA testing by the Department of Justice. This information directly supports Cooper's claim that evidence tampering played a major role in his conviction. Moreover, information regarding misconduct by Gregonis in an unrelated case, which bears directly on the reliability of evidence examined by Gregonis in Cooper's case was only recently uncovered by criminalists expert Dr. Patricia Zajac. A declaration signed June 17, 2003 attesting to Gregonis' misconduct could not have been available to Cooper in 1996.

Second, Gregonis' falsehood bears directly on the reliability of testing on A-41, which has materially changed in consistency and character in the years following Cooper's 1996 federal habeas petition. A-41 was apparently entirely consumed by testing at the time of trial. (Ex. 12 at 50-51; Ex. 153 at 2023-24.) It then re-appeared in 1998, long after Cooper's first federal habeas petition was filed, and appears to have inexplicably changed in consistency between 1998 and 2001 when it was ultimately tested by the DOJ. (Exs. 90, 92, 114, 203, 208.) Absolutely none of this information regarding the changing nature of A-41

why Cooper continues to request testing that will demonstrate whether there has been tampering.

between 1998 and 2001, and Gregonis' false testimony regarding his manipulation of A-41 in 1999, possibly could have been available to Cooper in 1996.

Third, entirely new questions surrounding Gregonis' manipulation of cigarette butt V-17, a cigarette butt supposedly recovered from the Ryen station wagon that later was shown to contain Cooper's DNA, did not arise until 1999. Gregonis checked out V-17, along with A-41 and a saliva sample containing Cooper's DNA, in 1999, and held onto this evidence for an inexplicable 24 hour period. Questions surrounding this inexplicable action taken by Gregonis could not possibly have been raised by Cooper in 1996 .

Fourth, the inexplicable elongation of V-12 was not revealed until the Department of Justice first examined it in 2001, five years after Cooper's federal habeas petition was filed. V-12, the cigarette butt supposedly found in the Ryen station wagon that was later determined to match Cooper through DNA testing, was completely used up at the time of trial by testing conducted prior to trial. (Ex. 169 at 2181-83.) It was described as being a small, four millimeter piece that was unfolded, submerged in liquid substrate, extracted of all saliva, and discarded. (Ex. 95.) In 2001, at the time of DNA testing, V-12 reappeared, and had magically grown to seven by seven millimeters in size. (Ex. 98.) Not coincidentally, a cigarette butt recovered from Cooper's car that appears similar in appearance to V-12, (Ex. 34), apparently disappeared, along with another hand rolled cigarette butt

found in Cooper's car that was taken into evidence but has since disappeared. (Ex. 171 at 2199.) Again, there is no possible way Cooper could have known this information in 1996.

The T-shirt is another example. Here for some reason, the Detectives chose to taken it out of the evidence room for over two months. They said it was for the preliminary hearing, but no preliminary hearing evidence tag appears in the photos taken in 2001 of the bag, and there appears no indication in the preliminary hearing transcript that it was ever introduced. Evidence came to light in 1998 and again I 2001 that there was heretofore unrevealed testing on the T-shirt at the time of trial. Perhaps respondent is comfortable with releasing those results post-execution, Cooper is not.

Respondent finally notes that Cooper has not appended a declaration from expert Blake. Cooper sufficiently alleged facts from Blake so as to support his motion. That is all he must do. As the Court is aware, Blake would not cooperate with counsel, apparently over some fee dispute, and refused to turnover materials until just recently. That is not Cooper's fault – he tried. That is Blake's fault.

Respondent does not even address the fact that there was misleading testimony at the evidence hearing in 2003. In fact, there are plenty of hairs left to test and none of them are Cooper's. Again, there is o reason not to test these hairs – they are clutched in the victims' hands. There was further misleading testimony

about the crime scene in an effort to argue that the hairs could be from the floor. Perhaps some were, but more than likely not. The hair appears in sufficient quantity and quality so as to be tested.

Finally, in this Claim and throughout, respondent fails to address what this Court already knows – that Cooper was denied every and any opportunity to prove any facts in support of his claims when the district court prevented him from investigating claims, reviewing the record, and presenting evidence. For instance:

The court assured counsel they would have a year to file and petition, and only giving them six months before allowing an execution date to be set.

The court forced counsel to file an inadequate petition by not granting a stay, and then once one was filed and state court exhaustion proceedings began, the court ordered that counsel cease all work on the case. Then, when counsel returned from exhaustion, the court held a hearing and ruled in a matter of months, without granting single discovery request, or allowing sufficient time or resources to even finish reviewing the record

The court refused nearly all of counsel's funding requests, including funding to review the record, to investigate innocence, and to investigate statements made by Josh Ryen to his psychiatrist. In fact, in the latter instance, the court attempted to conduct a hearing with an eye towards sanctions for counsel having done it on his own.

These events were not of counsel's making, they were the court's. Now that Cooper has managed to conduct some investigation, albeit with very limited resources from donations, he should not be penalized for being prevented from acting sooner.

IV. CLAIM THREE: RESPONDENT FAILS TO ADDRESS THE NEWLY UNCOVERED EVIDENCE THE STATE SUPPRESSED

Respondent again mischaracterizes the evidence submitted in support of Cooper's claim that the state failed to disclose material, exculpatory evidence. Criminalist William Baird played a critical role in the investigation of Cooper's case, as Baird was the official responsible for first viewing and ordering the collection of blood drop A-41 in the Ryen house, and the shoe print found in the Ryen house that was supposedly linked to Cooper. These were literally the only two items of evidence that could actually link Cooper directly to the Ryen house. Cooper asserted in his petition, and the state has apparently conceded, that Baird was a heroin addict. Cooper also asserted as a corollary that Baird's heroin use compromised the integrity of any investigation or testing he conducted at the time of trial.

Respondent claims that "the matters Cooper's (sic) alleges [with regard to Baird] occurred years after Cooper's trial." (Response, p. 22.) This is absolutely wrong. The state has again failed to take the thirty seconds or so necessary to turn

the page to the exhibit cited by Cooper in support of his claim that Baird's heroin use was an ongoing problem dating back to 1984, during the investigation and Cooper's trial. (Exhibit 107 at 1041.) Baird also states that "he felt it was 1984 when he started taking the drugs." 1984 is not only not "years after Cooper's trial" as the state erroneously asserts, but it is in fact the year Cooper's trial began. Cooper's trial did not conclude until May 1985.⁴ Finally, Cooper's defense team was unable to obtain this information from Baird until July 1997 because of the restrictions placed on the investigation by the district court. Clearly, this information would have had a material effect on Cooper's trial, and this information was not available to Cooper's defense team until after Cooper's first federal habeas petition had already been filed.

Respondent never really addresses the remaining pieces of evidence Cooper has presented. Instead, she merely counters that none of the three standing alone would have changed the jury's verdict. Of course, that is not the standard – it is all the evidence, when examined together, that must be evaluated, not each piece. Such a review would forever shield the state in a form of Brady water-torture as each small piece is only viewed alone. It is the collective weight of these

⁴ In fact, Cooper does not concede that the Baird misconduct only goes as far back as 1984. In his interview, Baird states that he believes it was that far back. Cooper has requested the personnel files to show the investigation of Baird's conduct. The

declarations, viewed in the totality of the circumstances, that constitutes clear and convincing evidence that the trial's outcome would have been different had this information been available at the time of trial. No jury is required to convict based on a single item of evidence; similarly, Cooper does not need to establish that any single item of evidence, standing alone, is necessarily sufficient to reverse the verdict.

Respondent ignores the fact that much of this evidence is newly-discovered. She merely asserts that it existed in 1984, and says nothing about when it was discovered by the defense. That date is 2002, when an investigator, privately retained, was allowed to review some of the files kept by prison personnel who remained concerned about the Cooper case. That investigation surrounded evidence that might have led to third-party suspects. When those interviews were conducted, it was learned that the witnesses also had information pertinent to the case that had been suppressed by the state. Cooper cannot be faulted for the courts denial of funding and his efforts to get an investigator, even if it meant soliciting donations from others because he is indigent.

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state has refused to turn them over. Rather than chastise Cooper for making this request, the state should just turn the material over.

V. CLAIM FOUR: RESPONDENT IGNORES THE IMPORT OF JOSH RYEN'S CHANGED TESTIMONY

In Claim Four, Cooper establishes that the police manipulated Joshua Ryen so that he would change his story to better reflect their theory of the case.

Respondent asserts first that there has been no showing as to why this claim could not have been raised before. Response, at 23. But, simply because a number of the facts supporting this claim were contained in the trial record, does not mean there has been a lack of diligence. In fact, this Court has been made aware in the context of several different claims and petitions the experiences post-conviction counsel had in the District Court in this case. *See Claim Two, supra*

The court repeatedly withdrew stays of execution in order to force counsel to file what every one knew and considered to be inadequate petitions;

Once a petition was filed and state court exhaustion proceedings began, the court ordered that counsel cease all work on the case. This prevented the review of the record and investigation that counsel had all along asked he be allowed to do. Then, when counsel returned from exhaustion, the court held a hearing and ruled in a matter of months, without granting single discovery request, or allowing sufficient time or resources to even finish reviewing the record

The court refused nearly all of counsel's funding requests, including funding to review the record, to investigate innocence, and to investigate statements made

by Josh Ryen to his psychiatrist. In fact, in the latter instance, the court attempted to conduct a hearing with an eye towards sanctions for counsel having done it on his own.

Respondent's next tact is to attack the evidence by Josh Ryen as the product of a confused 8-year-old. Response, at 24. However, this is exactly why the change in testimony is so significant and the police were able to manipulate him. What respondent fails to mention is that all the relevant testimony and reports from the time of the trial indicate that Ryen was fully competent and lucid when he continuously and for several days, exonerated Cooper.

VI. THE SUPERIOR COURT CANNOT CLOSE ITS DOORS TO A REQUEST FOR DNA TESTING SINCE IT HAD EXCLUSIVE JURISDICTION TO HEAR THE REQUEST AS THE STATE ARGUES IT CAN IN RESPONSE TO CLAIM FIVE

California Penal Code section 1405(a) requires that all post-conviction requests for DNA testing be made in the trial court that entered the judgment against the petitioner and that the right to request such testing is absolute:

(a) A person who was convicted of a felony and is currently serving a term of imprisonment may make a written motion before the trial court that entered the judgment of conviction in his or her case, for performance of forensic deoxyribonucleic acid (DNA) testing.

(m) Notwithstanding any other provision of law, the right to file a motion for postconviction DNA testing provided by this section is absolute and shall not be waived.

A court's flat refusal to accept a habeas petition that addresses for the first

time the fact of former counsel's failure to effectively provide the superior court with a full picture of the facts showing the Sheriff's department tampering of evidence and the impact of those actions on the circumstantial evidence presented against Mr. Cooper, is exactly the purpose of federal habeas review. The State could not be more incorrect when it argues that no cognizable federal habeas claim has been presented in claim five. (Response at 25.)

When access to a State's courts is denied, the precise remedy available is to address that failure in the federal court. Where, as here, a state court refuses entirely to consider a request for DNA testing, and refuses entirely to hear the basis for the second request for testing and the importance of the additional testing, that is exactly the sort of violation that habeas was designed to protect against.

Two pieces of additional testing were requested by that filing. The first was for EDTA testing of the T-shirt to determine whether the blood came from a sample taken from Mr. Cooper upon his arrest. (Exs. 40, 42.) The State ignores this requested discovery entirely. Testing of the T-shirt would show whether the EDTA preservative were present in sufficiently high quantities that it would show that the blood did not come from Mr. Cooper at the crime scene and instead from the sample of blood:

These preservatives do not naturally appear in human blood at such abnormally high levels, nor can such a concentration level be present in a blood sample due to normal daily activities . . .

.Therefore, if a blood sample contains an abnormally high concentration of a blood preservative, such as EDTA, it can be concluded with an extremely high degree of certainty that the blood was previously stored in a test tube containing blood preservative.

(Ex. 44 at ¶¶ 5-6.)

Mr. Cooper further requests mitochondrial DNA testing of the hairs that were clutched in the victims' hands. The testing of these hairs would provide critical information to eliminate the hairs from coming from any of the victims or anyone else that would have been expected to have crossed the crime scene. Multiple hairs having the same DNA and that further do not match one of the victims would be powerful evidence that there was another assailant, entirely contrary to the State's theory that Mr. Cooper committed these crimes alone. All of this evidence would certainly impact not only a jury determination of guilt, but it would impact greatly its determination of death as punishment. In fact, we do not have to guess what the impact would be as the jurors themselves have spoken out about the importance of this testing. (Exs. 140-45.)

The State argues that the hairs were not "clutched." (Response at 27.) A single glance at Exhibit 11 illustrates the State is plain wrong. The fact is that the hairs were in the victims' hands, not on their legs or torso. The fact is that there was a large quantity of hair in the victims' hands, much more so than on any other area of the bodies. No reasonable person looking at the evidence, not the jurors or

the victims' families, can deny that the victims were clutching these hairs and that they are important evidence to determining who the real killers are.

The State argues that only three out of the thousands of hairs found on the victims had roots. (Response at 27.) The State well knows that not all of the hairs have been examined for root material, and instead the literally thousands of hairs were looked at only cursorily and in large batches, thus we do not actually know if there is more root material to test. The State theorizes that the hairs “appear” consistent with that of the victims – but, only DNA testing can prove whether that is true.

The State argues that mitochondrial DNA testing is less discriminatory than nuclear DNA testing, and therefore would not provide useful results—hardly a basis for not conducting the tests. First, there are three suspect already laid out for the State, Messrs. Furrow, Koon, and Darnell. It is ironic that the State complains in its Opposition that “Cooper have never presented evidence that inculpatates anyone else for the Ryen/Hughes murders,” (Response at 20) but is now saying it can block efforts to develop such evidence.

Second, all the Petitioner can hope to do is to get the DNA test results into the hands of the State and then it is up to them to determine whether to run those results through their databases to attempt to determine whether there is a matching set of DNA on file. What is more, this entire argument ignores the fact that there

are already other likely suspects to compare the DNA results to and that at a minimum, the testing would show if there is a large amount of hair at the crime scene that matches none of the victims or other persons that would have been expected to have been donors of the hair.

VII. THIS COURT SHOULD PERMIT THE FILING OF THE PETITION BECAUSE CLAIM SIX SATISFIES THE REQUIREMENTS OF 28 U.S.C. SECTION 2244(B)

Respondent makes only two argument with respect to Claim Six, neither of which are compelling.

First, she asserts that the “delayed” discovery of the evidence in support of this claim is too late. Respondent does not dispute that evidence of Detective Eckley’s false statements were first discovered only in 1998, when Mr. Cooper’s investigator finally got access to the Disposition Report that had been concealed from him since the destruction of the coveralls. Respondent criticizes Mr. Cooper because he did not discover the false testimony earlier, but fails to explain how this was to be accomplished or why, more importantly, the State should be permitted to execute Mr. Cooper because it concealed the report. In December 1998 – well after the conclusion of the habeas proceedings in the district court – Mr. Cooper finally gained access to the Sheriff’s Department microfiche and microfilm file and viewed the Disposition Report. There can be no finding that Mr. Cooper did not act with due diligence in discovering the facts of this claim.

Second, respondent asserts that the District Court concluded that the bloody coveralls had no evidentiary value and further impugns Ms. Roper's credibility. The District Court's previously conclusion that the coveralls were destroyed in good faith was made in consideration of the evidence that petitioner now presents. The critical point, ignored by respondent, is that the new evidence proves that Detective Eckley's testimony that he made the decision to destroy the critical evidence without consulting anyone was false. (Ex. 186 [destruction decision reviewed by "KS", 195 at 2424-25.]

VIII. CLAIMS SEVEN, EIGHT AND NINE: CLAIMS THAT HAVE NEVER BEEN ADDRESSED ON THE MERITS CAN BE CONSIDERED ANEW HERE

Cooper has raised the Koon confession claim again here as Claim Seven. Respondent's only contention is that because the claim has been raised here before, it may not be raised again. Response, at 29-30. That is incorrect. The Koon confession claim has never been addressed because the Court has barred it as a successor. The question is whether the court may consider it anew in light of the other evidence that established that no reasonable fact-finder would find him guilty.

The answer to this question is in the affirmative. The court is free to consider such evidence when determining the value of this or any other claims.

At the time of his first round of appeals, the question was whether the Koon confession claim was even a successor. This court said it was. However, the question is now whether it can meet the threshold statutory requirements. That question is the one that needs to be evaluated in the context of all the claims asserted herein.

This is even more so for Claim Eight and Claim Nine. Those claims were clearly raised in a timely manner, but were denied because of the DNA results as the Court then understood those results. The holding was that because of those results, no claims could meet the standard required under the successor statute. While Cooper argued at the time that this was an improper use of DNA evidence to deny claims that went to the trial process, Cooper has now presented sufficient evidence to cast doubt upon those DNA results themselves. (see Claims One and Two.) As such, these claims must be considered now.

IX. CONCLUSION

For the reasons stated in the Application, this Reply, and in the accompanying Petition for a Writ of Habeas Corpus, petitioner requests a stay of his execution scheduled for February 10, 2004. In addition, because Mr. Cooper

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satisfies the requirements of 28 U.S.C. Section 2244(b), this Court should order the District Court to the Petition for Writ of habeas Corpus.

Dated: February 7, 2004.

Respectfully submitted,

/s/ (permission for electronic signature)

David T. Alexander
Counsel of Record for Petitioner

DECLARATION OF SERVICE

I am over the age of eighteen years old and not a party to the above-entitled action. My place of employment and business address is Orrick, Herrington & Sutcliffe LLP, Old Federal Reserve Bank Building, 400 Sansome Street, San Francisco, California 94111.

On February 7, 2004, I served a copy of the REPLY IN SUPPORT OF APPLICATION TO FILE SUCCESSOR PETITION FOR WRIT OF HABEAS CORPUS AND REQUEST FOR STAY OF EXECUTION by placing a true copy thereof enclosed in a sealed envelope designated by Federal Express with delivery fees provided for and delivering it to a Federal Express office in San Francisco, California authorized to receive documents, addressed to the following at their respective office addresses last given, as follows:

BILL LOCKYER, ESQ.
Attorney General of the State of California
HOLLY D. WILKENS, ESQ.
Deputy Attorney General
110 West A Street, Suite 1100
San Diego, California 92101

MR. FREDERICK K. OHLRICH
Court Administrator and
Clerk of the Supreme Court
Supreme Court of California
Earl Warren Building
350 McAllister Street
San Francisco, California 94102

and causing it to be personally delivered to:

KEVIN COOPER
C-65304-3-EB-82
San Quentin Prison

San Quentin, California 94974
CONFIDENTIAL LEGAL MAIL

I declare under penalty of perjury under the laws of the
State of California that the foregoing is true and correct and that this document was
executed on February 7, 2004 at San Francisco, California.

Lisa Marie Schull

DOCSSF1:729724.2